

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LETITIA DE VAWN STEWART,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 3:16-cv-05080 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 12, 17, 18).

After reviewing the record, the Court concludes the ALJ erred in determining whether plaintiff's disability has ended. Specifically, the ALJ erred at step two of the cessation analysis by failing to consider whether medical improvement of plaintiff's

1 severe impairments that were present at the time of the favorable disability determination
2 has occurred. Without a finding of medical improvement related to all of plaintiff's
3 severe impairments present at the time of the favorable disability determination, the
4 Court cannot determine whether the ALJ properly formulated plaintiff's residual
5 functional capacity and therefore the error at step two was harmful. Accordingly, this
6 matter should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the
7 Acting Commissioner for further proceedings consistent with this Order.

8 BACKGROUND

9 Plaintiff, LETITIA DE VAWN STEWART, was born in 1985 and was 22 years
10 old on the alleged date of disability onset of October 22, 2007 (*see* AR. 85, 90). Plaintiff
11 believes she finished the ninth grade (AR. 53). Plaintiff has no relevant work history
12 (AR. 22, 215, 291-92).

13
14 On June 8, 2010, an ALJ (hereinafter "the first ALJ") determined that plaintiff met
15 listing 12.04 and 12.08 of 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§
16 416.920(d) and 416.925) based upon severe impairments of bipolar disorder, borderline
17 personality disorder, anxiety disorder, attention deficit hyperactivity disorder, cognitive
18 disorder, NOS, and polysubstance abuse in remission (AR. 81-89). After the
19 Administration initiated a disability review to determine if benefits should continue,
20 another ALJ (hereinafter "the second ALJ") determined that " . . . as of November 1,
21 2011, the claimant had the following medically determinable impairments: History of
22 cerebrovascular accident; bipolar affective disorder; anxiety disorder; posttraumatic stress
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1 disorder; personality disorder; substance abuse disorder. These are the claimant's current
2 impairments." (AR. 14.)

3 At the time of the hearing, plaintiff was living in an apartment with her husband
4 and 10 month old daughter, with her son visiting on weekends (AR. 41).

5 PROCEDURAL HISTORY

6 The Court adopts plaintiff's uncontested Procedural History (*see* Dkt. 12, p. 2).

7
8 This is a cessation case. Letitia De vawn Stewart (hereinafter
9 Stewart) was found disabled in a decision issued on June 23, 2010 by ALJ
10 Strong after a hearing on June 8, 2010. (AR 81-89). The ALJ determined
11 that Stewart met listing 12.04 and 12.08 of 20 C.F.R. Part 404, Subpart P,
12 Appendix 1 (20 C.F.R. §§ 416.920(d) and 416.925). (AR 87). This was
13 based upon severe conditions consisting of bipolar, borderline personality
14 disorder, anxiety disorder, attention deficit hyperactivity disorder, cognitive
15 disorder, NOS, and polysubstance abuse in remission. *Id.* The onset of
16 disability was determined to be October 22, 2007, thus of longstanding
17 duration. (AR 89).

18 Eighteen months after the finding of disability, a disability review
19 process was initiated, triggered by an anonymous tip and disability benefits
20 were ceased. (AR 90-91, 115-27, 148-55). An administrative hearing was
21 held at the Agency level after disability benefits had been ceased and the
22 hearing examiner upheld the decision to end disability benefits. (AR 115-
23 27).

24 Dkt. 12, p. 2

Plaintiff's requested hearing was held before the second ALJ on December 3,
2013 (*see* AR. 31-80). On April 29, 2014, the second ALJ issued a written decision in
which he concluded that plaintiff was not disabled pursuant to the Social Security Act
(*see* AR. 9-30).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the ALJ
err by failing to show medical improvement in the conditions the prior ALJ found to be

1 disabling and which met a listing; (2) Did the ALJ err by giving the assessment by
 2 Christina Rasmussen, Ph.D., great weight because she was given very little information
 3 about Stewart's condition upon which she was found disabled by ALJ Strong, making it
 4 impossible to determine medical improvement; (3) Is the credibility assessment by the
 5 ALJ not supported by substantial medical evidence and not clear and convincing; (4) Did
 6 the ALJ err by outright rejecting of GAF scores even though accepted by the courts; and
 7 (5) Did the ALJ err by rejecting the lay witness evidence for improper reasons (*see* Dkt.
 8 12, p. 1).
 9

10 STANDARD OF REVIEW

11 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 12 denial of social security benefits if the ALJ's findings are based on legal error or not
 13 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 14 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 15 1999)).

16 DISCUSSION

17 **(1) Whether the ALJ erred by failing to show medical improvement in the** 18 **conditions the prior ALJ found to be disabling and which met a listing?**

19 Plaintiff argues the ALJ erred in evaluating the severe impairments that were
 20 “‘present at the time’ of the last finding of disability” (Dkt. 12, p. 3). Specifically,
 21 plaintiff avers the ALJ erred by only evaluating plaintiff for personality disorder (rather
 22 than borderline personality disorder) and history of cerebrovascular accident (rather than
 23 cognitive disorder, not otherwise specified) (Dkt. 12, pp. 4-5).
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1 Once a claimant is found disabled, a presumption of continuing disability arises.
2 *See Bellamy v. Secretary of Health and Human Services*, 755 F.2d 1380, 1381 (9th Cir.
3 1985). Although the claimant retains the burden of *proof*, this presumption shifts the
4 burden of *production* to the Commissioner to produce evidence to meet or rebut this
5 presumption. *Id.* Disability benefits cannot be terminated unless the Commissioner
6 presents substantial evidence demonstrating medical improvement in the claimant's
7 impairment so that the claimant is able to engage in substantial gainful activity. *See* 42
8 U.S.C. § 423(f); *Murray v. Heckler*, 722 F.2d 499, 500 (9th Cir. 1983).

9
10 The Commissioner follows specific steps in reviewing whether a recipient's
11 disability continues. To determine whether disability continues for a recipient of SSI, the
12 Commissioner evaluates the following steps:

- 13 (1) At step one, does the recipient "have an impairment or combination of
14 impairments which meets or equals the severity of an impairment listed
15 in" 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the recipient's
16 disability will be found to continue.
- 17 (2) At step two, has there been "medical improvement as shown by a
18 decrease in medical severity"? If not, the review proceeds to step four.
19 If so, the review proceeds on to step three.
- 20 (3) At step three, is the medical improvement related to an increase in the
21 recipient's "residual functional capacity based on the impairment(s) that
22 was present at the time of the most recent favorable medical
23 determination"? If not, the review proceeds on to step four. If so, the
24 review proceeds on to step five.
- 25 (4) At step four, if there has been no medical improvement or if such
26 improvement is not related to an increase in the recipient's residual
27 functional capacity, do any of the exceptions apply? If no such
28 exception applies, the recipient's disability will be found to continue.

(5) At step five, if medical improvement is related to the recipient's residual functional capacity or if one of the exceptions in 20 C.F.R. § 404.1594(d) applies, are all of the recipient's "current impairments in combination" severe? If the residual functional capacity assessment conducted at step three "shows significant limitation" in the recipient's "ability to do basic work activities," the review proceeds on to step seven. If there is no significant limitation, the recipient's impairments "will not be considered to be severe in nature," and the recipient "will no longer be considered to be disabled."

(6) At step six, if the recipient's impairment is severe, is the recipient able to engage in substantial gainful activity, and—based on the recipient's residual functional capacity—is the recipient able to perform the work he or she did in the past? If so, disability will be found to have ceased.

(7) At step seven, if the recipient is unable to do the work he or she did in the past, is the recipient able to do other work in light of his or her residual functional capacity, age, education, and past work experience? If so, disability will be found to have ceased. If not, disability will be found to continue. The Commissioner will continue to step seven even if the evidence in the recipient's file is not sufficient to make a finding about whether the claimant can perform past relevant work.

20 C.F.R. § 416.994(b)(5)(i)-(viii).

When, as here, a recipient of disability benefits challenges the cessation of benefits, the central issue is whether the recipient's medical impairments have improved to the point where she is able to perform substantial gainful activity. Whether an individual's entitlement to benefits continues depends on a two-part evaluation process: (1) whether "there has been any medical improvement in [the individual's] impairment(s)" and, if so, (2) "whether this medical improvement is related to [the individual's] ability to work." 20 C.F.R. § 416.994(b).

Under the first prong, the implementing regulations define "medical improvement" as "any decrease in the medical severity of [the individual's]

1 impairment(s) which was present at the time of the most recent favorable medical
 2 decision that [the individual was] disabled or continued to be disabled.” 20 C.F.R. §
 3 416.994(b)(1)(i). “A determination that there has been a decrease in medical severity
 4 must be based on changes (improvement) in the symptoms, signs and/or laboratory
 5 findings associated with [the individual’s] impairment(s).” 20 C.F.R. § 416.994(b)(1)(i).
 6 Furthermore, “if there has been a decrease in the severity ... of the impairment(s) present
 7 at the time of the most recent favorable medical decision,” the medical improvement is
 8 related to the individual’s ability to work only if there has been a corresponding “increase
 9 in [the claimant’s] functional capacity to do basic work activities.” 20 C.F.R.
 10 § 416.994(b)(1)(ii).
 11

12 *(a) Evaluation of Plaintiff’s Impairments from the Most Recent Favorable*
 13 *Medical Decision Finding Plaintiff Disabled*

14 Here, the first ALJ determined that plaintiff was disabled with the severe
 15 impairments of bipolar disorder, borderline personality disorder, anxiety disorder,
 16 attention deficit hyperactivity disorder, cognitive disorder, not otherwise specified, and
 17 polysubstance abuse in remission (AR. 85-89). The first ALJ also determined plaintiff
 18 met a listing under 12.04 (affective disorders) and 12.08 (personality disorders) (*see* AR.
 19 87-88). In his cessation analysis to determine whether plaintiff’s disability ended, the
 20 second ALJ found that plaintiff has the severe impairments of history of cerebrovascular
 21 accident, bipolar affective disorder, anxiety disorder, posttraumatic stress disorder,
 22 personality disorder, and substance abuse disorder (AR. 14). The second ALJ then
 23 determined that plaintiff’s “current impairments have not met or medically equaled a
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1 listing since November 1, 2011” (AR. 15). In addition, the second ALJ determined that
2 “as of November 1, 2011, there has been a decrease in medical severity of the
3 impairments” present at the time of the most recent favorable medical decision, also
4 referred to as the comparison point decision (“CPD”). Plaintiff argues that the ALJ
5 improperly considered plaintiff’s current impairments, rather than the impairments
6 present at the time of the favorable disability decision, to determine whether medical
7 improvement has occurred. The undersigned agrees.

8
9 Although the second ALJ stated that “the medical evidence supports a finding that
10 ... there has been a decrease in medical severity of the impairments present at the time of
11 the CPD” (*see* AR. 16), the ALJ did not specifically consider all of the impairments
12 present at the time of the most recent favorable disability determination. As noted by
13 plaintiff, the ALJ did not discuss borderline personality disorder, attention deficit
14 hyperactivity disorder, or cognitive disorder, not otherwise specified—diagnoses present
15 in the favorable decision (*see* AR. 87)—when assessing plaintiff’s current severe
16 impairments, nor did he discuss those impairments when he determined that medical
17 improvement has occurred (*see* AR. 14-24). As noted above, medical improvement is
18 “any decrease in the medical severity of [the individual’s] impairment(s) *which was*
19 *present at the time of the most recent favorable medical decision.*” 20 C.F.R. §
20 416.994(b)(1)(i) (emphasis added); *see also Kennedy v. Astrue*, 247 F. App’x 761, 765
21 (6th Cir. 2007) (citing 20 C.F.R. § 404.1594(b)(1), the substantially similar statute for
22 evaluation under disability insurance benefits). The Court finds the ALJ erred by failing
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1 to consider all of plaintiff's severe impairments in determining whether medical
2 improvement has occurred.

3 Defendant argues that the ALJ specifically considered all of the severe
4 impairments present at the CPD (*see* Dkt. 17, pp. 3-4). However, without discussion of
5 those severe impairments, the Court cannot determine whether the ALJ actually
6 considered all of the severe impairments. As an initial matter, the ALJ did not discuss
7 plaintiff's attention deficit hyperactivity disorder in making his finding regarding her
8 current severe impairments (*see* AR. 15-17). In addition, as noted by plaintiff, personality
9 disorder and borderline personality disorder are not the same diagnoses. *See* Diagnostic
10 and Statistical Manual of Mental Disorders (Text Revision 4th ed. 2000) ("DSM-IV-
11 TR") at 685 (noting that there are "10 specific Personality Disorders" including
12 "Borderline Personality Disorder"). Similarly, cognitive disorder, not otherwise specified
13 is a different diagnosis than a history of cerebrovascular accident. *Compare* DSM-IV-TR
14 at 179-80 (describing Cognitive Disorder Not Otherwise Specified) *with* Stedmans
15 Medical Dictionary 4460 (describing cerebrovascular accident as "an imprecise term for
16 cerebral stroke"). Thus, the second ALJ did not evaluate the same impairments the first
17 ALJ found severe.
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19 Defendant also argues that "the ALJ clearly established medical improvement
20 because the medical evidence he reviewed provided substantial evidence to support a
21 finding that Plaintiff did not have an impairment or combination of impairments that met
22 or medically equaled the severity of a Listing." However, according to the Ninth Circuit,
23 "[l]ong-standing principles of administrative law require us to review the ALJ's decision
24

1 based on the reasoning and actual findings offered by the ALJ - - not *post hoc*
 2 rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray*
 3 *v. Comm’r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*,
 4 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina v. Astrue*, 674 F.3d
 5 1104, 1121 (9th Cir. 2012) (“we may not uphold an agency’s decision on a ground not
 6 actually relied on by the agency”) (citing *Chenery Corp, supra*, 332 U.S. at 196). Nothing
 7 in the evidence of record before the Court suggests that the ALJ specifically considered
 8 the severe impairments present at the most recent favorable medical decision, and the
 9 Court declines to entertain any post hoc rationalizations that attempt to intuit what the
 10 second ALJ may have been thinking when he did not discuss all of the diagnoses when
 11 finding medical improvement.
 12

13 (b) *Harmless Error Standard*

14 The Court also concludes that the second ALJ’s error in evaluating whether
 15 plaintiff’s severe impairments has improved is not harmless. The Ninth Circuit has
 16 “recognized that harmless error principles apply in the Social Security Act context.”
 17 *Molina*, 674 F.3d at 1115 (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054
 18 (9th Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation
 19 in *Stout* that “ALJ errors in social security are harmless if they are ‘inconsequential to the
 20 ultimate nondisability determination’ and that ‘a reviewing court cannot consider [an]
 21 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
 22 crediting the testimony, could have reached a different disability determination.’” *Marsh*
 23 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In
 24

1 *Marsh*, even though “the district court gave persuasive reasons to determine
2 harmlessness,” the Ninth Circuit reversed and remanded for further administrative
3 proceedings, noting that “the decision on disability rests with the ALJ and the
4 Commissioner of the Social Security Administration in the first instance, not with a
5 district court.” *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

6 Here, the second ALJ erred at step two of the analysis and failed to specifically
7 address whether there has been any medical improvement in all of plaintiff’s severe
8 impairments present at the time of the most recent favorable medical decision. Because
9 the ALJ did so, the Court cannot determine whether the ALJ properly formulated the
10 residual functional capacity or the hypothetical posed to the vocational expert to find
11 plaintiff’s disability has ended (*see* AR. 16-25). Because plaintiff was found to be
12 capable of performing work existing in the national economy, the error affected the
13 ultimate disability determination and is not harmless.

14 **(2) Plaintiff’s Remaining Assignments of Error**

15 The ALJ’s error at step two of the cessation analysis requires remand to the
16 Administration to properly consider whether medical improvement has occurred as to all
17 of plaintiff’s severe impairments. As the ALJ’s error at step two impacts all aspects of the
18 ALJ’s decision, the ALJ is instructed to re-evaluate this entire matter on remand. Thus, it
19 is unnecessary to address the other issues raised in plaintiff’s appeal.
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(3) Whether this matter should be reversed and remanded for an award of benefits or for further administrative proceedings.

Plaintiff contends that this matter should be reversed and remanded with a direction to reinstate disability benefits (*see* Dkt. 12, p. 14). The Court may remand this case “either for additional evidence and findings or to award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Social Security Administration does not determine a claimant’s application properly, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put forth a “test for determining when [improperly rejected] evidence should be credited and an immediate award of benefits directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (quoting *Smolen*, 80 F.3d at 1292). An award of benefits is appropriate when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

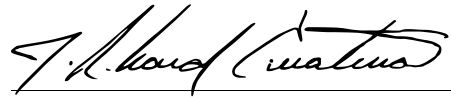
Harman, 211 F.3d at 1178 (quoting *Smolen*, 80 F.3d at 1292). Here, outstanding issues must be resolved, including whether or not plaintiff has experienced medical improvement of all of her severe impairments present at the time of the favorable disability determination. Accordingly, remand for further consideration is warranted in this matter.

CONCLUSION

Based on these reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with this order.

JUDGMENT should be for Plaintiff and the case should be closed.

Dated this 29th day of August, 2016.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
United States Magistrate Judge